National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 24, 1996

TO: Elizabeth Kinney, Regional Director, Region 13

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Chicago Exhibit Production, Inc., et al., Case 13-CA-33571

530-6083-2001-2500, 530-6083-2001-5050, 530-8023-9500, 775-8765, 775-9050

This case was submitted for advice regarding whether the Employers violated Section 8(a)(1) and (5) by withdrawing from coordinated negotiations with the Union for a successor agreement after "discovering" that they remained bound as "me-too" signatories to an existing agreement between the Union and an employer association.

FACTS

A.Background

The Woodworkers Association of Chicago Inc. ("WAC") represents employers in negotiations with the Chicago and North Illinois District Council of Carpenters ("Union"). As discussed infra, until February 1995, WAC was a multi-employer association whose members formed a single bargaining unit. These employers are predominately engaged in the construction of cabinetry. The 16 employers at issue here ("Employers") are engaged in the exhibit and display segment of the woodworking industry, and have never been members of WAC.

On various dates from 1973 through 1992, the Employers became "me-too" signatories to the collective-bargaining agreements between WAC and the Union by virtue of having signed so-called "hard card" agreements with the Union. The "hard cards" provide, inter alia, as follows:

2. The parties adopt, and the EMPLOYER agrees to be bound by the terms and conditions of a collective-bargaining agreement . . .[(1)] between the UNION and Woodworkers Association of Chicago Inc. . . .

. . .

4. This agreement, and the agreement adopted by reference as aforesaid, shall be in effect as of . . .[(2)] and remain in effect to and including the expiration date of the agreement adopted by reference. This agreement shall continue in effect from year to year thereafter and the parties specifically adopt any agreement entered into between the UNION and Woodworkers Association of Chicago Inc., bargaining agent for their members, subsequent to the expiration date of the agreement adopted by reference as aforesaid unless notice of termination or amendment is given in the manner provided herein.

5. Either party desiring to amend or terminate this agreement must notify the other with an acknowledgment in writing at least three calendar months prior to the expiration of the then agreement adopted by reference. . . .

In 1993, WAC and the Union executed a collective-bargaining agreement covering the period from June 1, 1993 through May 31, 1995 ("WAC-1"). WAC-1 did not contain any provision for termination or modification of the agreement. The "hard card" signatory Employers implemented WAC-1 upon being informed it had been negotiated.

On February 27, 1995,[(3)] the employer members of WAC notified the Union by letter that they were terminating the current WAC-Union agreement as well as their "hard cards" with the Union. The letter was written by Karl Grabemann

("Grabemann"), their authorized representative, and listed the employer members. None of the Employers was named in this letter. On March 29, the WAC employer members, via Grabemann, notified the Union in writing that they were "extricat[ing] themselves from the multi-employer bargaining unit. . . ." The employers stated that WAC would be representing them in negotiations for separate successor collective-bargaining agreements, covering single employer bargaining units. Again, none of the instant Employers was named in this letter.

WAC and the Union reached an agreement in principle on a successor agreement on May 31 ("WAC-2"), for the period June 1, 1995 through May 31, 2000. WAC-2 did not contain any provision for termination or modification of the agreement.

In late May or early June, the Union and another group of employers executed a separate agreement called the "CEDI Agreement," which contains higher wages than WAC-2. During the first or second week of June, the Union contacted several of the exhibit and display employers and asked them to sign the CEDI Agreement.

The Employers declined and instead contacted each other and agreed to meet and discuss the Union's proposal. One of the Employers invited Grabemann to attend a meeting to discuss their negotiating strategy.

On June 14, Grabemann sent a letter to the Union advising it that the Employers had authorized him "to represent them in collective bargaining negotiations with [the Union] for a successor agreement(s) for the period subsequent to May 31, 1995." (Emphasis omitted.) The parties then participated in three negotiating sessions -- July 12, 14, and 17 -- but no agreement was reached on the economic issues. The Union insisted upon the CEDI Agreement while the Employers sought wage concessions from the WAC-2 contract.

After the third bargaining session, Grabemann asked the Employers to provide him with a copy of their previous agreement with the Union. When they were unable to do so Grabemann deduced that the Employers had signed "hard cards," and asked the Employers to search their files. Several Employers thereupon produced "hard card" agreements with the Union. On July 18, Grabemann informed the Union that it was the Employers' position that they were contractually bound by WAC-2 because neither party had given timely notice of termination of the "hard cards."

On July 25, the Union responded that the WAC agreement did not apply to the Employers because the parties had already begun negotiations. The Union also contends that the Employers withdrew from WAC, and consequently the "hard cards" were terminated, when WAC ceased to function as a multi-employer association.

B.The Instant "CA" Charge

On July 25, the Union filed the instant Section 8(a)(5) charge against the Employers for refusing to bargain when the parties "mutually agreed to terminate the agreement" through their correspondence, conduct, and dialogue. After the Union filed its charge, a majority of the Employers withdrew their authorization to be represented by Grabemann. All but two of the Employers signed the CEDI Agreement.

C.Related "CB" Charge

On October 19, the Employers filed Section 8(b)(1)(B) and (3) charges in Cases 13-CB-14854 and -14935 against the Union for refusing to honor WAC-2, and for bypassing the Employers' representative. The Region dismissed these charges on November 30 and December 6, respectively. On June 14, 1996, the Office of Appeals denied the Employers' appeal of the dismissal of these charges.[(4)]

ACTION

We conclude that the Region should dismiss the Section 8(a)(5) charge, absent withdrawal, because: (a) the Employers' "hard cards" remained valid after WAC ceased to function as a multi-employer bargaining unit; (b) neither party terminated the "hard cards" prior to the expiration date of WAC-1; (c) by virtue of the automatic renewal clause of the "hard cards," the parties were bound to either WAC-1 or WAC-2 subsequent to May 31, 1995; and (d) the parties' subsequent negotiations therefore constituted voluntary negotiations to modify the new WAC agreement, and these voluntary negotiations lawfully could be

terminated at any time.

A.The WAC Agreement Renewed Pursuant to the "Hard Cards"

1.The Termination of the Multi-Employer Association

did not affect the Employers' "Hard Cards"

Employers who agree to be bound by a collective-bargaining agreement negotiated between a union and a multi-employer association ("master contract") but do not join the association, so-called "me-too" signatories, do not thereby become members of the multi-employer unit.(5) No Board decisions were found addressing the effect upon "me-too" signatories of an association's conversion from the representative of a single multi-employer bargaining unit to the representative of individual bargaining units. We conclude that such an event does not automatically terminate "me-too" agreements.

The Board has held that even if a union or multi-employer association terminates the master contract, "me-too" signatories remain bound to the master contract based on their separate agreements with the union.(6) By analogy if a "me-too" agreement can survive the termination of the master agreement it adopts by reference, a "me-too" agreement should likewise survive the termination of the multi-employer association/unit if the association continues to negotiate agreements with the union.

The "hard cards" here do not indicate that they are valid only so long as WAC remains a multi-employer association/unit. We note the argument that these "me-too" agreements could automatically terminate where association members agree to different individual agreements. If multiple WAC-Union agreements existed, the "hard card" agreement to "specifically adopt any agreement" between the Union and WAC would cease to have meaning. That argument is inapposite here. Since the WAC employers and the Union agreed to one contract, WAC-2, the "hard card" reference to "adopt any agreement" remains meaningful and is enforceable.(7) Also, as discussed below, one could argue that under the "hard cards," WAC-1 -- which was negotiated while WAC was a multi-employer association -- renewed itself with regard to "me-too" signatories such as the Employer. Consequently, the "hard cards" were not automatically terminated merely because WAC ceased to function as a multi-employer association/unit.

2.The "Hard Cards" were Never Terminated

before WAC-1 Expired

In Deluxe Metal Furniture Co.,(8) the Board reaffirmed its policy of strictly construing contractual notice of termination clauses. The Board held that only a timely notice of termination can forestall contract renewal. "An untimely notice will, instead, be treated merely as a request for modification by mutual assent unless the parties thereafter clearly terminate the contract."(9) These principles were applied in Moving Picture Operators, Local 224 (K-B- Theatres),(10) where the employer's written notice of termination was never posted, the only notice of termination received by the union was oral and untimely, and the parties negotiated over wage reductions. Strictly construing the contract's notice provisions which required written notice of termination, the Board held that the contract automatically renewed due to lack of timely notice of termination.(11) Moreover, the union's willingness to negotiate over wages was held to be "not inconsistent with its position that the contract's term had been extended," as it allowed the parties to modify the contract to address the employer's alleged financial difficulties.(12)

Here, since there is no termination or modification provision within WAC-1, the only method of terminating or modifying the collective bargaining agreement between the Employers and the Union was pursuant to the "hard cards," by notice at least three months prior to the expiration of WAC-1. It is undisputed that neither the Union nor the Employers served a timely notice to terminate the "hard cards" prior to the expiration of WAC-1 on May 31, 1995, much less three months in advance of that date as required by the "hard cards." Applying the reasoning of Deluxe Metal, we conclude that, by not terminating the "hard cards," the parties are bound by a WAC agreement.

It is unclear whether the WAC agreement which applied to the Employers after May 31 is WAC-1 or WAC-2. We note that paragraph 4 of the "hard cards" could be read to support either conclusion.(13) Paragraph 4 provides, "This agreement shall continue in effect from year to year thereafter and the parties specifically adopt any agreement entered into between the UNION and the [WAC], bargaining agent for their members, subsequent to the expiration date" of the extant collective-bargaining agreement. It could be argued that WAC-1 binds the "me-too" signatories because they intended to be bound only by agreements entered into by WAC as a multi-employer association and therefore WAC-1 continues in effect as to the "me-too" signatories. As we discussed previously, "me-too" signatories may remain bound to multi-employer collective-bargaining agreements even though the actual parties to the agreements no longer are bound by them.(14) On the other hand, one could read the "hard card" language that "the parties specifically adopt any agreement entered into between the UNION and [WAC], bargaining agent for their members, subsequent to the expiration date" of the extant collective-bargaining agreement to mean what it literally says i.e., that the Union and the me-too signatories are bound to WAC-2 because it was entered into by the Union and WAC after May 31.

In any event, it is unnecessary to decide here whether the parties intended WAC-1 or WAC-2 to apply, because the gravamen of the alleged violation is that the Employers refused to bargain further with the Union by taking the position that they were already bound to an agreement.(15) By finding that the Employers are bound to a WAC agreement, we are concluding that the Employers are not obligated to bargain further with the Union as to the terms of a current collective-bargaining agreement. Also, the parties are unlikely to disagree as to which WAC contract binds them because the Employers have contended that they are bound to WAC-2 and the Union probably prefers WAC-2 to WAC-1 because WAC-2's terms are more favorable to the Union than those of WAC-1.

We find inapplicable Allied Industrial Workers, Local 770 (Hutco Equip. Co.),(16) and similar decisions relying upon the principle that, even when timely notice is not given, a party who nevertheless enters into negotiations "could have waived the notice requirement and agreed to bargain." Id. In Hutco, while the prior contract was still in effect -- before it renewed and thereby became a new agreement binding on the parties -- the parties entered into negotiations after the date for notice of intent to terminate or modify the extant contract had passed. The union failed to object at the first negotiating session to the untimeliness of the employer's notice. As a result the union was held to have waived its objections to the employer's late notice of intent to terminate the prior contract by participating in negotiations. Consequently, the union was obligated to continue negotiating for a new contract even though the employer's notice of intent to terminate was untimely.

Here, unlike in Hutco and similar cases,(17) the parties did not even request, much less enter into, negotiations until after the WAC-1 contract already had expired on May 31, and a new WAC agreement (either WAC-2 or a renewed WAC-1) already had taken effect pursuant to the "hard cards." Consequently, the parties' conduct subsequent to May 31 could affect only the new WAC agreement that bound them, not the expired agreement. Moreover, it makes no sense to apply a Hutco waiver of untimely notice of termination analysis when the Employers' June 14 letter requesting negotiations for a new agreement could be construed as timely written notice to terminate the "hard cards" at the expiration of the new WAC agreement. In sum, although it can be argued that, as in Hutco, a party may waive its right to object to another party's untimely notice to terminate or modify an agreement prior to the expiration of that agreement, a waiver of the terms of the prior agreement cannot occur after the prior agreement expires. Here when the prior agreement expired and a new agreement replaced it as a consequence of Paragraph 4 of the "hard cards," the prior agreement was no longer in effect and, therefore, was not subject to termination or modification. Instead, a new agreement is in effect and the parties are bound to it.(18)

B.The Employers Requested Modification

of the new WAC Agreement

Where parties to an agreement have not included a reopener clause allowing for mid-term modification of the agreement, the parties may voluntarily engage in bargaining over mid-term changes.(19) As a consequence, either party may withdraw from negotiations without violating the Act.(20) The same result applies under Deluxe Metal, which holds that untimely notice to modify or terminate constitutes a request to modify the contract.(21)

Here, neither WAC-1, WAC-2, nor the "hard cards" contained a provision for reopening the WAC agreement for modifications. For this reason, under Hydrologics, the Employers' June 14 letter requesting negotiations for the period subsequent to May 31 constituted a request to modify the contract by mutual assent. The same result obtains under Deluxe Metal, since the Employers' June 14 letter was sent long after the expiration of the "hard card" notice of termination period. Since the parties did not agree to a new contract during those negotiations, the Employers were free to withdraw from these negotiations for any reasons including their somewhat incredible belated "discovery" of the "hard cards."[(22)] In these circumstances, the Employers remained bound by the new WAC agreement.[(23)]

In summary, the Employers' "hard cards" -- which were still in effect and had never been terminated -- bound them to either the WAC-1 or WAC-2 agreement after May 31, 1995 the parties' subsequent negotiations constituted voluntary negotiations to modify that agreement, and these voluntary negotiations lawfully could be terminated at any time. For the aforementioned reasons, we conclude that the Region should dismiss the Section 8(a)(5) charge, absent withdrawal.

B.J.K.

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[1] Each "hard card" specifies the date of the WAC-Union collective-bargaining agreement then in effect.

[2] Id.

[3] All dates refer to 1995 unless otherwise noted.

[4] The Office of Appeals did not find that the parties were not bound by WAC-2. The denial of the appeal of the refusal to bargain charge was made on the narrow basis that the Union had not engaged in any conduct in support of its position that it was not bound by WAC-2.

[5] Kuykendall Painting Co., 308 NLRB 177, 179-80 (1992) (citing Ruan Transport Corp., 234 NLRB 241, 242 (1978)).

[6] See, e.g., Adobe Walls, Inc., 305 NLRB 25, 27 (1991) enf'd, 146 LRRM 2832 (6th Cir. 1994) (automatic renewal clause in collective-bargaining agreement bound "me-too" signatories, even though collective-bargaining agreement terminated as between union and employer association); Fortney & Weygandt, Inc., 298 NLRB 863, 864 (1990) (same); C.E.K. Industrial Mechanical Contractors, Inc., 295 NLRB 635-636 (1989) (same).

[7] Cf. Charles D. Bonnano Linen Serv., Inc. v. NLRB, 456 U.S. 404, 414 (1982) (adoption of interim contracts inconsistent with multi-employer bargaining can fragment multi-employer bargaining association, but consistent interim agreements do not fragment bargaining); Culinary Workers, Local 226 (Desert Palace, Inc.), 281 NLRB 284, 285 n.5 (1986) (multi-employer association negotiated two contracts, one for downtown casinos and another for casinos located on "the strip," and "me-too" signatories adopted applicable contract).

[8] 121 NLRB 995, 1002 (1958).

[9] Id. According to the Board:

[B]y including a clause containing such conditions precedent to termination, it is clear that the parties intend and expect that their bargaining relationship will continue for the full specified period, and that the termination part of the clause is one to be exercised, if at all, as a last resort.

Id. at 1004.

[10] 238 NLRB 507, 510-11 (1978).

[11] "In this case there was no opportunity for the Union to waive the contract's notice provision because there was no communication between the Union and the Company until after the contract automatically had extended itself. . . ." Id. at 511.

[12] Id. Accord: NKS Distributors, Inc. (Century Wine and Spirits), 304 NLRB 338, 345 (1991) (in finding that a reopener clause had been exercised, the Board noted that the parties' negotiations over contract proposals did not constitute an admission that the contract had terminated) enf. denied, 50 F.3d 18 (3d Cir. 1995).

In numerous other decisions, the Board has strictly construed contractual notice of termination clauses. See e.g., IBEW, Local 3 (Burroughs Corp.), 281 NLRB 1099, 1101 (1986) (contract renewal not forestalled despite employer's request for bargaining over wages after notice period had lapsed, and union's notice of termination untimely), enf'd 828 F.2d 936 (2d Cir. 1987); Empire Screen Printing, Inc. 249 NLRB 718, 718-19 (1980) (notice to modify contract sent several weeks late, and subsequent negotiations of the parties failed to forestall contract renewal); Sawyer Stores, Inc., 190 NLRB 651, 652 (1971) (notice of termination that was mailed several hours after the contractually required 60 days prior to contract expiration did not forestall contract renewal); Moore Drop Forging Co. 168 NLRB 984, 985 (1967) (contract automatically renewed and therefore operated as a bar although parties exchanged contract proposals after notice period had run, and despite past practice of negotiations without contractual notice of termination).

[13] Due to the ambiguity of the "hard card" language, a complete interpretation would require an analysis of the parties' bargaining history. See Gulf Refining and Marketing Co., 238 NLRB 129, n.2 (1978) (look to parties' bargaining history to determine intent when contract is ambiguous).

[14] See supra at 5 n.6.

[15] The instant charge alleges that the Employers violated Section 8(a)(5) by taking the position that they are bound by a collective-bargaining agreement between the Union and WAC.

[16] 285 NLRB 651, n.2, 654 (1987).

[17] See, e.g., Executive Cleaning Services, Inc., 315 NLRB 227, 227 n.3 (1994) (employer never refused to bargain or otherwise objected to union's late notice to modify contract), enf. denied, 67 F.3d 446 (2d Cir. 1995); Cox Corp., 226 NLRB 384, 386 (1976) (parties negotiated following untimely notice), enf'd, 593 F.2d 261 (6th Cir. 1979). Cf. Anchorage Laundry & Dry Cleaning Ass'n, 216 NLRB 114, 115 (1975) (employer could have waived untimely notice to modify contract but instead objected at initial negotiation session). See also Hassett Maintenance Corp. 260 NLRB 1211, n.3 (1982), and General Maintenance Service Co., 182 NLRB 819, 822 (1970), enfd. 442 F.2d 1347 (4th Cir. 1971). In both of these cases, employers had otherwise unlawfully refused to bargain with unions and thus were barred from raising the untimeliness of the unions' notices as a defense for first time at the Board hearing.

[18] One could argue that the distinction between the instant case and the Hutco, Cox Corp., and Executive Cleaning Services line of cases where the Board found a waiver, is insignificant because in those cases the contractual time period for filing a notice to terminate or modify the contract had ended without a notice being given and therefore, the contracts would, absent the waiver automatically renew after the expiration date. However, as in this case where both the notice was given and bargaining was initiated after the expiration date, a new agreement would be in effect and, as discussed above, the legal principles which apply in that situation are conceptually different from those for a situation where the new contract has not yet taken effect.

[19] Hydrologics Inc., 293 NLRB 1060, 1062 (1989). By contrast, if mid-term negotiations for modifications take place pursuant to a reopener clause, upon impasse the parties may use economic weapons. Id.; Speedrack Inc., 293 NLRB 1054, 1055 (1989).

[20] Connecticut Power and Light Co., 271 NLRB 766, 766-67 (1984).

[21] 121 NLRB at 1004.

[22] See Century Wine, 304 NLRB at 345-46 (Board held that union under no duty to volunteer its legal theory or to remind the employer of the need to provide proper notice to terminate the contract).

[23] We note that the Employers that subsequently agreed to the CEDI Agreement remain bound by it. See, e.g., Farm Crest Bakeries, 241 NLRB 1191 (1979) (party cannot object to untimely notice to terminate where it agreed to be bound by competitors' contract).